

The Pragmatics of Legal Language

Andrei Marmor

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University of Southern California Law School
Los Angeles, CA 90089-0071

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THE PRAGMATICS OF LEGAL LANGUAGE¹

Andrei Marmor

In most standard cases, the content of the law is tantamount to the content that is communicated by the relevant legal authority. It has been long noticed by linguists and philosophers of language, however, that the content of linguistic communication is not always fully determined by the meaning of the words and sentences uttered. Semantics and syntax are essential vehicles for conveying communicative content, but the content conveyed is very often *pragmatically enriched* by other factors.² Recent literature on these issues makes it increasingly evident that the pragmatic determinants of communicated content are ubiquitous, and often play an essential role in determining what has been successfully communicated. Therefore, it is expected that the kind of problems we face in explicating the pragmatic aspects of language use will surface in the law as well. My purpose in this essay is to explore some of the pragmatic aspects of understanding what the law communicates. We will see that in some respects the pragmatics of legal language is unique, sometimes uniquely problematic. Exploring those problems forms one of the aims of this essay. But I will suggest that we can do more than that: once we draw the necessary distinctions between the various pragmatic aspects of language use, and see how these different categories emerge in the legal context, we will be able to of-

¹ Some of the ideas that I develop in this article I had published in a much shorter, and somewhat more tentative version, in a paper written for a symposium issue of *Analisi e diritto*, entitled 'What Does the Law Say? Semantics and Pragmatics in Statutory Language'. I hope that the present discussion will dispel some of the obscurities in that earlier paper.

² The term '*pragmatic enrichment*' has been coined by Scott Soames.

fer some generalizations about types of pragmatic enrichment that could be taken to form, or not to form, part of what is actually determined by legal expressions.

The pragmatic aspect of language use is typically associated with two key ideas: one idea refers to the prevalent role that *context* plays in understanding the content of an act of communication. The second idea is related to the distinction between what has been said or asserted, and what has only been *implied* or implicated.³ It is important, however, not to conflate these two issues: context may play a crucial role in our ability to understand what has been asserted whether there is any further implicated content or not. And *vice versa*: though it is often the case that implied content is context dependent, this is not necessarily so; there are cases in which the content implied is not particularly context-sensitive.

Generally speaking, speakers' ability to convey communicative content that goes beyond what they say typically depends on two main factors: a relatively rich contextual background that is common knowledge between the conversational parties, and certain norms that apply to the conversational interaction. Both of these features, I will try to show, are particularly problematic in the legal context. There are some cases, however, in which implied content is semantically encoded in the expression used. This kind of implied content, I will argue, would normally form an integral part of the content of the law.

I. SEMANTIC CONTENT AND ASSERTED CONTENT.

For the sake of convenience, let us stipulate that “speech” stands for any occasion of verbal communication, whether it is oral communication or a written text. The most

³ There is a third topic associated with the pragmatics of language use concerning the speech-act aspect of language. I will largely ignore the speech act aspect, it is not particularly relevant to our present concerns.

basic distinction we will need here is between three different levels of content that may be conveyed by an occasion of speech: namely, between what has been *said* by the speaker; what has been *asserted* by the speaker; and what has been *implicated* by the speech in its particular context.⁴ Together, these three types of content may form the complete communicative content that is conveyed by a speaker on an occasion of speech. Since there is no uniformity in the terminology used in the literature, let us stipulate here that what a speaker *says* on an occasion of speech is the content which is determined by the syntax and semantics of the expression uttered. Normally, this would consist of the literal meaning of the words used, and the syntactical structure of the sentence. Both are basically determined by the rules of the relevant language that determine what words and sentences mean.

The content that is actually asserted by a speech often goes beyond what has been said. In these cases, the content asserted is not fully determined/explicable by the meaning (and syntax) of the sentence uttered. When the assertive utterance is a descriptive statement, then the asserted content is simply the proposition that is conveyed by the speaker. When the speech is of a different kind, like a question asked, or a warning issued, the asserted content would not consist in a proposition but some other type of content, corresponding to the type of speech act performed. Legal utterances typically do not consist of descriptive statements. Legal norms prescribe modes of conduct, grant rights, impose obligations, etc. In short, the content of the law is typically prescriptive. It is an open question, and a rather controversial one at that, whether prescriptive utterances are

⁴ I am certainly not suggesting that these are the only distinctions available. In fact, it is probably the case that for various purposes, philosophers of language may need more fine-grained distinctions than the ones I draw upon here. Nor is it the case that these terms are generally used precisely in the ways I use them here. Terminology is neither entirely consistent in the literature, nor the distinctions are free from controversy.

basically propositions or not. I do not want to get into this controversy. I will therefore use the term ‘prescriptive content’ to stand for the content that is asserted by an instance of legal speech, leaving it open whether such content is propositional or not.

Now, there is a very wide range of cases in which the asserted content is not fully determined by what has been said. First, there is a group of cases in which contextual factors are necessary in order to determine what is/are the particular object(s) that the utterance refers to. The most obvious and familiar cases are pure indexicals and demonstratives. When pure indexicals (like “I”, “now”, “today”, “next year”) are used in a speech, the content conveyed is a combination of elements that are contributed to the content of communication by the literal meaning of the words used, and some objective features of the speech situation, such as the time and/or place of its utterance, who is speaking, etc. There is some controversy in the literature about the question of whether demonstratives (like “he”, “they”, “this” etc.), function, basically, like pure indexicals or not.⁵ We do not need to get into these controversies. Whatever the best account of demonstratives is, however, it is clear that in uttering an expression that contains a demonstrative, the assertive content depends on the relevant intentional and contextual factors that determine the reference of the expression.⁶

Now, it may happen, of course, that the formulation of a legal text employs indexicals, demonstratives, etc. However, precisely because it is widely recognized that the

⁵ See D Kaplan, (1989), ‘Demonstratives’ in Almog *et al* eds, *Themes from Kaplan*, and cf. Soames, S. (1987), ‘Direct Reference, Propositional Attitudes, and Semantic Content’, *Phil Topics*, vol 15, 47

⁶ Another familiar type of cases in which contextual knowledge is required to grasp the object spoken about concerns instances of possessive ascriptions. Suppose, for example, that a speaker says: “I have just finished reading Joseph’s books.” Now, what the expression of “Joseph’s book” stands for can either mean a book that was written by Joseph, or a book that belongs to Joseph, or perhaps even a book that is about the said Joseph. Under normal circumstances the choice between these options is rendered clear by the context and the parties’ prior knowledge at the relevant stage of the conversation.

use of such terms renders the content of the expression profoundly context-dependent, legal formulations normally try to avoid them. If the law needs to set a deadline, for example, it would phrase the deadline by mentioning a specific date, not by saying something like “next week” or “by the end of next year”. Of course exceptions are possible, and typically unfortunate, because then the content conveyed by the law is indeed very context dependent. And in the legal case, as we shall see in detail below, the context is often very unclear.

There are, however, other types of cases in which the asserted content is not quite determined by what has been said. Here are some familiar examples⁷:

(a.) A doctor examining a gunshot wound tells the patient: “Don’t worry, you are not going to die.” Clearly, the doctor did not assert that the patient is never going to die, but only that he is not going to die from this particular wound.

(b.) When I get home in the evening and my wife asks me “Have you eaten?”, it is quite clear that she is asking me if I have already eaten dinner tonight, not whether I have ever engaged in the activity of eating.

(c.) The barman who is asked for a drink by a youngster says: “Sorry, you must be 21 years old” – surely the barman asserted that the patron must be *at least* 21 years old, not exactly 21.

As we can see, there is a great variety of cases in which the content asserted by a speaker differs from what the speaker said. The assertive content of speech is often determined by contextual factors that are supposedly shared by the parties to the conversation. The contextual background is often rather general and shared by a certain popula-

⁷ All of these are slight variations of the examples discussed by Kent Bach, “Conversational Implicature,” *Mind and Language*, 9, 1994, 124-162, and Scott Soames, ‘Interpreting Legal Texts: What is, and What is not, Special about the Law’ (forthcoming).

tion, and sometimes it is very specific to the conversational parties/context. In many cases we grasp the content that is asserted by a speaker on the background of *what it would make sense* for the speaker to communicate in the circumstances; namely, of how the content would make a relevant contribution to the conversation at the particular stage of its utterance and given the prior knowledge of the parties concerned.

The question we need to address here is whether it may happen in the legal context that the *prescriptive content* of a law is somewhat different from what the law *says*. Let us take an act of legislation as our paradigmatic example of legal speech. The following example might show how problematic this issue is. In the famous case of *Holy Trinity*,⁸ the relevant Congressional act prescribed that it is forbidden to facilitate the immigration of laborers to the country. The purpose of this law was to try to reduce the influx of cheap unskilled labor which, at the time, was seen as a major draw on the US economy and labor market. However, the relevant part of the law was phrased as forbidding the importation of “labor or service of any kind”. In this case, a high ranking clergyman was brought from England to serve as the rector of the Holy Trinity church, and the question was whether the act really forbids importation of this kind of labor, or is it confined to manual labor. The court held that the use of the word “labor” in this act is, indeed, confined to manual labor and does not apply to clergy men. The specific grounds for this decision (some of which were rather obscure) should not detain us here. The question is whether in such cases it would make sense to suggest that the court simply identified the *prescriptive content* of the congressional speech, and the fact that this content is not fully determined by what the relevant words “labor or service of any kind” semantically mean,

⁸ Rector, Holy Trinity Church v. U.S., 143 U.S. 457, 1892.

should not necessarily count against it. So, is it just like an ordinary case of conversation where the assertive content differs somewhat from what has been said?

Critics of this decision pointed out two main facts that cast a serious doubt on this possibility. First, it would be difficult to reconcile with the fact that the act also includes a list of explicit exceptions (actors, artists, lecturers, singers, and domestic servants). Normally, when the law prescribes a general norm and adds a list of explicit exceptions, unless the exceptions are formulated (or suggested) as examples, they are taken to be exclusive.⁹ Second, and more importantly, it has been noted that there was some discussion in Congress about this specific question. Some congressmen suggested to use the expression ‘manual labor’ in the act. However, when the act was voted on during the next congressional session, the issue did not come up again. The reason for this wavering is not difficult to surmise. It is pretty clear from the context of the legislation that its purpose was to stop the influx of cheap unskilled labor. But it is equally clear that Congress must have felt somewhat uncomfortable in making this focus on cheap labor all too explicit. It must have been politically rather inconvenient to explicitly declare that the law targets the importation of cheap manual labor.

Now, you might think that I am just pointing to the very familiar problem of the difficulties involved in ascertaining legislative intent. Well, that is certainly part of the problem in such cases, but it is not the main feature of the situation that is relevant to our question. Let us reconsider the case of an ordinary conversation. When the communicative content asserted differs from the speech’s semantic content, it is normally *obvious* to the relevant conversational parties that this is the case. When the patient hears the doctor telling him “don’t you worry, you are not going to die”, he would not contemplate for a

⁹ More on this, below.

second that the physician promises him eternal life. And when my wife asks me if I have eaten, it really does not occur to me that she might be asking whether I have ever engaged in the activity of eating. And in this, I think, there is a general lesson: A speaker would normally succeed in conveying assertive content that differs from what he says, when it would be obvious to the hearer, in the particular context of the conversation, that it just cannot be the case that the speaker asserts exactly what he says.

As a comparison, consider a case where it is not obvious that the speaker could not have meant exactly what he said. Suppose that when my wife gets home in the evening I ask her: "Have you eaten blackberries?" Now here it is quite possible that I ask my wife if she has ever eaten blackberries, and it is also possible that I ask her whether she had eaten blackberries sometime earlier today. It is far from obvious which option I had in mind, and it would not be surprising if my wife asks for clarification. Now of course it is possible to fill in the context in such a way as to make the content of my question very clear to both of us. But then we must assume a much richer context which would make it obvious what the conversation was about. Absent such rich context, known to both of us, it would be perfectly sensible on my wife's part to ask: what exactly do you mean? And this would be a clear indication that I have not succeeded in asserting some content that differs from what I said.

Now you see where I am heading. The *Holy Trinity* case is like the latter example. In saying that it is forbidden to facilitate the importation of "labor or ... of any kind", it is anything but obvious that Congress does not quite prescribe what it says. If it is appropriate to ask: "by saying 'P', what exactly do you mean?", then we have a very clear indication that this is just not a case where the content conveyed is different from its semantic

content. At best we could say that it is not entirely clear what the asserted content of this speech really is.

It might be fair to complain that in discussing the *Holy Trinity* case, I just picked a difficult example. Other cases might be much more simple. Let me mention such a case, though an imaginary one, discussed by Soames in precisely this context.¹⁰ He considers the famous fable mentioned by Lon Fuller about the passenger sleeping in a train station: suppose we come across an enactment which stipulates that “It shall be a misdemeanor... to sleep in any railway station.” Now consider the case of a passenger who was waiting for a delayed train at 3AM, and while sitting on the bench, fell asleep for a few minutes. Would we say that this passenger violated the ordinance? Surely, that would not seem to be a sensible result. Soames considers the possibility that this would be one of those cases in which what the law prescribes is not exactly what it says. The law *says* that it is an offense “*to sleep*” in the train station, but in fact, the prescriptive content of this ordinance is somewhat different; it prohibits an attempt *to use the railway station as a place to sleep in*, or something along those lines.

Considering this option, Soames rightly says, in my mind, that such an analysis “is a stretch”.¹¹ As he explains: “Although one can imagine completions of the story in which the lawmakers really did understand themselves to be so asserting the contextually enriched context that gives the desired results, one can also imagine completions in which they didn’t give the matter much thought...”. In other words, even in this relatively simple case, the context is not rich enough to make it obvious and transparent that the legislature could not have meant/asserted what it said. It is just as likely that the legislature

¹⁰ “Interpreting Legal Texts: What is, and what is not, Special about the Law”, forthcoming.

¹¹ *Ibid*, at p 17.

expressed some content that it took to be clear in some cases, and hasn't given much thought to others; legislatures can always rely on other agents, like courts and administrative agencies, to determine further specifications of the law, as need arises. Furthermore, note there are other interpretative options to get the sensible result, that is, without assuming that the legislature prescribed something different from what it said. For example, it might be plausible to argue that dozing off on the bench for a few minutes is just a borderline case of "sleeping"; or one can apply the legal doctrine of *de minimis* – some violations of the law are so minimal that it should not be the law's business to try to enforce them, and this would certainly be such a case.

You may still think that there must be some cases in which it is quite obvious that the content the legislature prescribes is not exactly what it says. Perhaps there are, we cannot rule such things out, but I think that such cases would be very rare. An essential aspect of what enables parties to an ordinary conversation to express content that is not exactly what their expressions mean, consists in the fact that an ordinary conversation is, typically, a cooperative activity. In ordinary conversations we normally assume that an instance of speech purports to make a relevant contribution to the conversation, given the stage in which the conversation is, and the prior background knowledge of the relevant parties. Legislation, however, is not an ordinary conversation. As I will later explain in some detail, legislation is typically a form of strategic behavior, and a very complex one at that. Given the strategic nature of legislation, it would seem rather unlikely that the prescribed content of an act of legislation is obviously and transparently different from what it says.

II. IMPLIED CONTENT

The content that is actually asserted by an expression in a given context does not necessarily exhaust the full content of what has been communicated under the particular circumstances of speech. Often there is some further content that is only implicated, but not quite asserted, by the speaker. Let us call this the *implied content* of an utterance. The implied content of P in context C can be defined as the content that the speaker, in the specific context C, is *committed to* by uttering P, and that the hearers are expected to know that the speaker is committed to, and the speaker can be expected to know this. A speaker can be said to be committed to a content as being part of what he/she communicated under certain circumstances, if an explicit *ex post* denial of that content by the speaker would immediately strike a reasonable hearer in those circumstances as perplexing, disingenuous, or sometimes even downright dishonest.

There are three main types of cases in which content is implied by an instance of speech: conversational implicatures, semantically encoded implications (sometimes called conventional implicatures), and presuppositions. The differences between these categories are quite important in the legal case; they yield different results with respect to the kind of implications that could be assumed to be part of the law. Therefore, we must take a close look at these various cases and carefully note the differences between them. The Gricean concept of conversational implicatures is probably the best known case, and in some respects, it is paradigmatic, so let us start there.

A. Conversational Implicatures.

Let me briefly review some of Grice's main ideas about implicatures.¹² His main insight, I take it, is that our ability to understand content of expressions beyond their semantic/assertive¹³ content is due to a combination of two kinds of factors: general norms of conversation that apply to the relevant speech situation, and specific contextual knowledge that is shared by speaker and hearer in the circumstances of the utterance. In normal conversational situations, when the main purpose of speech is the cooperative exchange of information, there are certain general maxims that apply. Grice helpfully listed and classified these maxims of ordinary conversation, and they are basically as follows:

- a. *maxims of quantity* – make your conversational contribution as informative as required, *viz.*, don't say too little and don't say too much;
- b. *maxims of quality* – don't say what you believe to be false, and don't say something if you do not have adequate evidence for it;
- c. *maxim of relevance* – make your contribution relevant to the conversation;
- d. *maxims of manner* – avoid obscurity, ambiguity, be brief and orderly.¹⁴

As noted, these maxims apply to ordinary conversations where the purpose of the conversation is the cooperative exchange of information. The maxims are norms that di-

¹² P. Grice, *Studies In The Way of Words*, Harvard University Press, 1989.

¹³ The question of beyond what, exactly, conversational implicatures operate is somewhat controversial. Grice typically speaks about the distinction between what is said and what is implicated; presumably, by 'what is said', Grice includes assertive (and not just semantic) content. Scott Soames, however, argues that a great deal of assertive content is also partly determined by pragmatic features of conversation, including implicatures. See Soames, 'Drawing the Line Between Meaning and Implicature – and Relating both to Assertion', forthcoming in *Nous*.

¹⁴ Grice, *Studies in the Ways of Words*, 28.

rectly instantiate the specific functions or purposes of communicative interactions and facilitate those functions.¹⁵

The next step is introduced by the notion of implicatures. A certain content is implicated by a speaker if it is not part of what the speaker had actually asserted, but nevertheless implicated by what he said in the specific speech situation, given the conversational maxims that apply. In other words, a speaker S conversationally implicates q by saying p in context C, iff

- a. S observes the relevant conversational maxims in C;
- b. the assumption that S meant (or intended that) q is required in order to make sense of S's utterance of p in context C, given the conversational maxims that apply;
- c. S believes/assumes that his/her hearers can recognize condition b, and can recognize that S knows that.¹⁶

To mention one of Grice's examples, consider the following situation: X, standing near his immobilized car that ran out of gas, asks for the help of Y, a local person, passing by. Knowing these facts, Y says 'There is a gas station in the next village'. Now, Y has not actually *said* that the gas station is open and would have gas to sell. But given the maxims of conversation (e.g. be relevant, don't say something you believe to be false, etc.), it would be natural to assume that this was implicated by what Y has said. It is con-

¹⁵ It is quite possible that some specific conventional settings may determine some maxims are relevant and should be followed. It is part of the conventions of theater, for instance, that some of the regular conversational maxims are suspended, and this is something that follows from the nature and purpose of theatrical performances.

¹⁶ This last condition of transparency is actually rather problematic and controversial. Grice himself was aware of a serious problem here considering the implicatures involved in using disjunction. See Soames, 'Drawing the line ...'.

tent that Y is committed to, given the situation and the conversational maxims that apply.¹⁷

As Grice himself emphasized, there are two main features essentially associated with conversational implicatures:

1. Conversational implicatures are always *cancelable*. The speaker in our example could have added, ‘but I’m not sure that the gas station is open’ – in which case, the implicature would be explicitly canceled. Generally speaking, cancelability is an essential feature of conversational implicatures.
2. Conversational implicatures are very context specific; they are not conventionally determined by the rules of language. There is always some derivation, as a Grice called it, that leads us to construe the content of an implicature; some story has to be told to make it explicit.

The second condition needs to be qualified, however. In addition to regular conversational implicatures, Grice also identified a category of cases he called *generalized conversational implicatures*. His examples are the following:

‘Anyone who uses a sentence of the form *X is meeting a woman this evening* would normally implicate that the person to be met was someone other than X’s wife, mother, sister or perhaps even close Platonic friend. Similarly, if I were to say *X went into a house yesterday and found a tortoise inside the front door*, my hearer would normally be surprised if some time later I revealed the house was X’s own.’¹⁸

Generalized conversational implicatures are those in which an expression is used that would normally implicate a certain content, unless that implication is explicitly cancelled. A speaker can say “X is meeting a woman this evening” and immediately add “I wonder if the woman is X’s wife or not”. Here, the implicature is explicitly cancelled by

¹⁷ Grice, *Studies in the Ways of Words*, 32.

¹⁸ *Ibid.*

the latter sentence. Now, what Grice seems to suggest is that in the non-cancelled cases, so to speak, when somebody says “an A”, failing to specify whose A it is, the expression would normally implicate that one has no specific knowledge about it or that one deems it irrelevant to the context to specify whose A it is. Otherwise, the speaker would simply fail to follow the conversational maxim of quantity (don’t say too little). Similarly, when a speaker says “I sat in a car for an hour last night”, the speaker would implicate that it was not his own car. But again, such implication can be cancelled by adding, say: “I had really too much to drink; perhaps I was sitting in my own car.”

In other words, generalized conversational implicatures are created by a combination of the semantic features of certain standard expressions in natural language – hence the generality – and particular contexts in which the conversational maxims apply. Expressions of the form “an A” are semantically such that they generate a certain type of expectation; given the conversational maxims that apply in concrete speech situations, this expectation normally generates an implicature.

Cases of generalized conversational implicatures should be distinguished, however, from another familiar type of cases, in which a certain implicature has been used so frequently that it actually became an idiomatic expression with a conventional meaning that differs, somewhat, from the literal meaning of the words used. Examples are very familiar: “Do you have the time?” – which is not normally used as a question about possession, but to ask the hearer what time it is; or, similarly, “Can you pass me the salt?” – used to make a request, not to ask the hearer about his or her ability to do something. Now, it is quite plausible to surmise that these idiomatic expressions have emerged in natural language from repeated uses of conversational implicatures. However, they have

long gained a certain conventional meaning, which is no longer a matter of implicature; the use of these expressions is now completely idiomatic, and they conventionally mean something that differs somewhat from the literal meaning of the words used. In short, these are no longer implicatures.¹⁹

Finally, a note on the idea of truthfulness: it should not be assumed that the maxim of truthfulness entails that implicatures are generated only if the implied content is true and/or believed to be true by speaker. On the contrary: precisely because implicatures are generated, partly, due to the maxim that in ordinary conversation a speaker would not say something that he/she believes to be false and/or irrelevant to the conversation, it is the case that implicatures can be abused. A speaker can assert something true and implicate something that he knows to be false. As an example, consider this case: Mr Smith goes to a hospital and in making some enquiries with one of the nurses, he presents himself as “Dr Smith”. As it happens, Smith’s doctorate is in philosophy. Wouldn’t the nurse be rather surprised, and quite rightly annoyed, in learning this little detail later on? Or consider this case: you call up one of your colleagues from another university to enquire about a job candidate for your department. In response, your colleague tells you: “Yes, I know the guy, he is really a marvelous fellow, absolutely terrific!”. Later on you learn that your colleague only referred to the candidate’s personality, not to his academic accomplishments, which, as it happens, are seriously wanting. Like the nurse in the previous example, you’d rightly feel cheated. As we can see, in both of these cases, the asserted content is true; it is only the implicature that is false.

¹⁹ See for example, Bach and Harnish, *Communication and Speech Acts*, (MIT, 1992) at 173; Searle refers to these cases as conventionally used indirect speech acts; see his *Expression and Meaning*, (CUP, 1979) at pp. 36-43.

It is now time to address the question of whether implicatures have a role to play in determining the content of the law. Once again, I will begin by taking the legislative context as the paradigmatic example. Later I will say something about other cases, where the results might be different.

Generally speaking, pragmatic implication requires (at least) three conditions:

1. A *speaker* who has certain communication intentions.
2. A conversational *context* that, at least to some extent, is *common knowledge*, that is, shared by speaker and hearer.
3. Some *conversational maxims* that apply to the relevant speech situation.

In the legislative case, I want to argue, all these conditions – though mostly the third -- are rather problematic. Let me explain, taking these three conditions in turn.

1. Communication Intentions.

The problems about the first condition are well known and I will not dwell on them here. The speaker in the legal case is often a parliament, or some other legislative agency, which may be comprised of hundreds of people. As we know, attributing communication intentions to a collective agency raises some conceptual problems that have to be resolved. Since I have elaborated on this elsewhere²⁰, I will not repeat the argument here. Suffice it to say that I don't believe that the conceptual problems of attributing intentions to a collective body are insurmountable. A group of people can share certain intentions such that, under certain circumstances, the intention is rightly attributable to the group, as such. In any case, I will put aside these general conceptual issues here. Some of the specific problems about determining the relevant kind of communication-intentions that can ground implicatures I will explore shortly.

²⁰ See my *Interpretation and Legal Theory*, revised 2nd ed., (Hart Publishing), Chapter 8.

2. *Conversational Context.*

The context of legislation is often much more opaque than a regular conversational situation, and for three main reasons. First, there are problems of insufficient information. Judges and litigants are not parties to the legislative conversation, so to speak, and they have to rely on secondary sources to gather the relevant information. How reliable those sources are, varies greatly between different legal cultures and practices, and it varies greatly with particular circumstances. Even when information is fully available, however, two main problems remain: there is some inherent uncertainty about where exactly does the conversation begin, and even about who the conversational parties are. In ordinary conversations, when the purpose of speech is the cooperative exchange of information, the context is relatively closed, as it were, by boundaries determined by the conversational situation. The conversational situation of an act of legislation is often much more open-ended, without clear boundaries. We know where the story ends, that is, with the act voted on²¹, but we often don't quite know where it begins and how wide the scope of the background should be taken to be. And, it may not be entirely clear who the participants to this conversation are. Should we include only legislators? That seems too restrictive; an act of legislation is often the result of a complex interaction between legislative bodies and other political agents, such as administrative agencies, various committees, lobbying groups, and other constituencies that try to influence the emerging legislation. The main problem here is not the complexity of the situation but the fact that there

²¹ In fact, even this is not always so clear. A very interesting example in the US is the so called “blue books” of the Congressional Joint Committee on Tax, providing post-enactment interpretations of tax legislation, which are considered almost authoritative interpretations of the legislation. Another example, though not quite so stark, might be the famous *Chevron* doctrine, prescribing a great deal of deference to agencies’ interpretations of relevant legislation. And then, of course, if you think about the Continental legal systems, you might think about the important contribution of legal treatise and textbooks to a general understanding of what the law says. In short, even the question of where the conversation *ends* is not so easy to answer.

are no clear criteria of relevance. True, some legal cultures may have certain rules or conventions that partly determine criteria of relevance. A legal system may have a rule or convention determining, for example, that lobbying should be excluded from consideration and should not, as matter of law, be part of the conversational background of understanding legislation. But usually, even in legal cultures that have formed some rules about such issues, a great many questions about such criteria of relevance remain undecided.

3. *Conversational Maxims.*

It is here, I think, where the main difficulty lies. The Gricean maxims of conversational implicatures are the norms that apply to an ordinary conversation, where the purpose of the participants is the cooperative exchange of information. But the legal case is quite different. The enactment of a law is not a cooperative exchange of information. Therefore, we should not be surprised if some of the Gricean maxims may not apply to the context of legislation and, more problematically, it is often not clear which norms, if any, do apply. The main reason for the difference resides in the fact that legislation is typically a form of *strategic behavior*. In fact, the situation is more complicated: legislation consists of at least *two conversations*, so to speak, not one.²² There is a conversation between the legislators themselves during the enactment process, and then the result of this internal conversation is another conversation between the legislature and the subjects of the law enacted. The internal conversation is, more often than not, very strategic in nature. It certainly does not abide by the Gricean maxims of cooperative interaction. And then, when we look at the conversation between the legislature and the law's subjects – often mediated by the courts -- it would be difficult to ignore the strategic nature of the

²² As we will see shortly, sometimes more than two conversations. There are cases in which the legislature purports to convey different messages to different audiences.

conversation that generated the relevant speech. What aspects of this strategic interaction courts should be willing to consider as relevant would necessarily be a normative question, and one that is bound to be controversial. Let me mention some familiar examples to demonstrate these points, and then try to draw some general conclusions.

The most familiar aspect of legislation is that it is almost always a result of a *compromise*. Compromise often consists in what I would like to call *tacitly acknowledged incomplete decisions* – that is, decisions that deliberately leave certain issues undecided.²³ This is closely tied to the problem of collective agency:

X says “P” intending to implicate Q

Y says “P” intending to implicate not-Q

X and Y act collectively, intending their collective speech in saying P to remain undecided about the implication of Q.

Now, the problem is that the underlined ‘intending’ is often not so clear; in fact, the typical case would be one of conflicting and incompatible intentions, hopes, expectations, etc. (*viz.*, both X and Y intending – or hoping, or expecting – their intentions to prevail).²⁴

Let me consider a typical example.

Suppose that a bill is proposed to impose some new restrictions on carbon emissions on motor vehicles. Assume that there are 100 members of parliament. Typically, the bill would be initiated by a group of legislators who are particularly concerned with the environment and the dangers of global warming, etc. Assume that this group, call it the “greens”, consists of 20 legislators. In order to pass the new bill, the greens need the support of at least 31 other legislators (call them the median legislators), many of whom may

²³ There is nothing new in this idea, it has been noted by numerous writers.

²⁴ This has been noted, among others, by R. Dworkin, *A Matter of Principle*, at...

not feel so strongly about environmental issues. In fact, most of them may be rather reluctant to impose further burdens on the automobile industry. Thus, in order to gain the majority needed to pass the bill, the greens have to act strategically. They have to convince the median legislators to support the bill in spite of their initial reluctance to do so. Typically, the greens can do that in two ways -- and usually, in a combination of both -- either by giving the median legislators something in return (e.g. their vote on a different bill that the median legislators care more about), or by modifying the suggested bill to accommodate the concerns of the less enthusiastic supporters. In this latter case, we will normally see some modifications to the initially proposed bill, changes in its formulation that result from negotiation and compromise. It is in the very nature of such compromises, however, that parties can reach an agreement because they can employ the device of *tacitly acknowledged incomplete decisions*. That is, the opposing parties will deliberately leave some formulations of the bill open to conflicting interpretations, hoping that the interpretation they favor will eventually prevail.

Clearly, the problem in such cases is that different and incompatible content might be implicated by different groups of legislators, and it is far from clear which one ought to prevail. If you look at the content that might be implicated by the initiators of the bill, the greens in our case, you would give effect to intentions of a minority; after all, we assumed that the greens do not have enough votes to pass the bill. If, on the other hand, you follow the intentions of the median legislators, you give effect to the intentions of those who did not really care much about the objectives of the bill and often know very

little about it (and note that they also form a minority).²⁵ In Gricean terms, the problem here is twofold: there is an inherent indeterminacy about who counts as a relevant party to the conversation, and what kind of contribution different parties to the conversation should be allowed to make.

Strategic behavior is not confined, however, to internal conversation between the legislators. Consider those cases, for example, in which the legislature deliberately speaks in several voices, so to speak. There are legislative enactments in which the legislature intends to convey one message to the public at large, and a different one to agencies, or the courts, etc. Meir Dan-Cohen has explained this phenomenon, and its rationale, in his detailed study of some criminal defenses.²⁶ To mention an example of the rationale of such legislative double-talk, consider the defense of duress in criminal law. This is a very problematic defense: on the one hand, considerations of deterrence weigh against recognizing such a defense; we would not want to encourage people to succumb to threats and commit crimes out of fear or weakness of character. On the other hand, considerations of human compassion call for a recognition of such a defense. It would be very inconsiderate, almost inhuman, to punish people for things they have done under enormous threat, especially when we know that we would have succumbed to the threat ourselves in those same circumstances. Now, this is a serious conflict, but one that allows a certain solution: the law could generate the impression that it does not recognize duress as a defense, or that it would only grant it in extremely dire circumstances, but at the same time, the law could instruct the courts to grant the defense when considerations of fairness and com-

²⁵ See, for example, D.B. Rodriguez and B.R. Weingast, 'The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation', *University of Pennsylvania Law Review*, vol. 151, 2003.

²⁶ See M. Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law', in his *Harmful Thoughts*, Princeton University Press, 2002, 37.

passion call for it. As Dan-Cohen demonstrates, this is more or less what actually happens in common law. And it makes a lot of sense.

I hope you can see that the temptation to use this device might be great in many legislative contexts. Legislators may wish to create the impression that they are doing one thing – e.g. seriously restricting campaign finance contributions – while actually trying to do the opposite – allowing such contributions to flow freely but less transparently. What we have in such cases, is almost like a conflicting implicature: looked at from one angle, the legislature implicates one thing, looked at from a different angle, it implicates the opposite. Furthermore, as the two examples mentioned just show, there is no general policy that can apply across the board. In some cases, like the example of duress, the legislative double-talk makes a lot of sense and is probably morally commendable. In other cases, like the campaign finance example, the double-talk is rather questionable. (Here, you may recall that an implication can be false or deceptive even if the content asserted is true.)

Let me pause to take some stock. I have tried to show that unlike regular conversational contexts, where the parties to the conversation aim at a cooperative exchange of information, a non-cooperative form of communication is present in the legislative context. The process of legislation itself is plagued with strategic behavior that tries to overcome the lack of initial cooperation between the relevant agents. And then, once we have the result of this process, it becomes very difficult to determine which aspects of it are relevant to determining the content of the legislative speech, and which aspects ought to be ignored. All this makes it very doubtful that we can get a clear sense of what would be the relevant Gricean maxims that apply to such legislative speech situations.

Assuming that I am correct about this, the following question arises: if the maxims of conversation that Grice identified do not necessarily apply to the context of legislative speech, are there other norms that apply instead? Can we think of maxims of conversation that would apply to the kind of strategic behavior manifest in legislative speech situations? This, I think, is a very difficult question to answer. The answer partly depends on the normative, that is, moral-political, understanding of the role of legislation in a legal system, and partly on the interpretative practices that courts actually follow. Let me try to explain both of these points.

Abstractly, the idea is this: one might think that just as we draw conclusions about the maxims that apply to an ordinary conversation from the basic cooperative objective of ordinary conversations, we should be able to draw some conclusions about the maxims that would apply to legislative speeches from the nature and objective of such communicative interactions. As we noted earlier, the Gricean maxims of conversation are normative instantiations of the general purpose of a conversation seen as a cooperative exchange of information. Legislation is a different kind of conversation. Can we not simply observe the main objectives of such conversation and then draw some conclusions about the relevant conversational maxims that would instantiate those objectives? Perhaps we can think about it in a way which is very similar to a competitive game. The purpose of competitive games is not the cooperative exchange of information; games manifest certain forms of strategic behavior. However, the rules of the game typically determine what counts as the point of the game, what kind of skills and abilities one would need to exhibit in order to play the game and play it successfully.²⁷ Typically we can draw some

²⁷ I have elaborated on this in much greater detail in my *Social Conventions: A Philosophical Analysis*, ch 2, book ms .

conclusions from the purpose of the game about different forms of conduct in it that would be deemed permissible, and others, which would not be permissible. Consider chess, for example. Since it is an intellectual kind of competition, we should be able to conclude that chess players are not allowed to use physical intimidation as part of their tactics in the game.²⁸ In other games, however, such as boxing, and perhaps even football, physical intimidation might be perfectly acceptable. In other words, we can draw some normative conclusions about the kind of moves players should be allowed to make, simply from the nature of the game and its general purposes. Can we extend this analogy to legislation, and try to deduce some maxims of conversation that would basically instantiate our conception of what kind of “game” legislation is, so to speak?

In principle, this should be possible. However, the problem is that any conception of the nature of the “game”, which would be sufficiently thick to generate the kind of normative conclusions we are after, is bound to be controversial. People tend to have very different moral-political conceptions of the appropriate division of labor between legislative and adjudicative institutions in the relevant political system. There is, for example, a well known debate about the role of legislative intent in statutory interpretation. Some judges hold the view that whenever the intention of the legislature about the purpose of the law enacted, or even about the ways in which the law was intended to apply, is discernible, they are bound to respect those intentions and give them effect; others deny this, and hold the view that courts should not be interested in the intentions or purposes legislatures may have had when they enacted the law. Now this is just an example of the kind of views which reflect deeper controversies about the institutional role of a legislature in, say, a constitutional democracy. The question of whether we should take into account,

²⁸ An actual case of this kind is nicely discussed by R Dworkin, *Taking Rights Seriously*, ch 3.

and to what extent, the particular intentions of a legal-political authority in interpreting its directives, depends on one's views about the legitimacy of such authorities, and their moral-political rationale.²⁹ And these views tend to be very controversial.

The element of controversy is relevant here because conversational norms, of the kind Grice pointed out, can only play the role that they do in generating implicatures if the parties to the relevant conversation actually follow them and are known to do so by the conversational parties. If we cannot be sure that the speaker follows the relevant conversational maxims, we cannot be sure what, if anything, was implicated by his speech in the particular context of the conversation. Therefore, if different parties to the conversation have different views about the conversational norms that they would follow, it becomes impossible to infer what, if anything, would be implicated by their speech.

Now, this leads us to the second point I mentioned, which basically follows from it: Over time, the norms of statutory interpretation that are actually followed by the courts may partly determine the conversational maxims of legislation. In following certain norms about the ways in which courts interpret statutory language, the courts could create some kind of Gricean maxims for the legislative context. For example, the extent to which courts are willing to hear evidence about statutory history would partly determine the norms of relevance about legislative implication. These norms would partly determine what counts as a relevant contribution to the conversation between legislators and the courts, so to speak. Thus, to some extent, and greatly depending on the interpretative culture of the courts, some Gricean maxims might be present even in the legislative context. Note that the reliability of such norms crucially depends on the actual consistency, over time, of the interpretative practices of the courts. If the courts do not consistently adhere

²⁹ I have explained this in much greater detail in my *Interpretation and Legal Theory*, revised 2nd ed., ch 8.

to the relevant interpretative practices, the legislators would not have clear signals about what would count as a relevant contribution to the conversation between them and the courts, and therefore, inevitably, even between the legislators themselves.

Perhaps one way to think about it is by imagining that there is a kind of an “acoustic filter” between the legislature and the law’s subjects, basically generated by the interpretative practices of the courts; some facts about the legislative process pass through the filter, and others don’t. As long as the legislators know which aspects of the conversational background would pass the acoustic filter, they would have a sense of what is the contribution they can make to the conversation; they would have a sense, that is, of what can only be implied and what needs to be asserted. But if the legislators do not have a very clear sense of what passes through the filter, their ability to convey messages that somehow go beyond what they explicitly say would be seriously diminished.

The general conclusion to draw from this is that conversational implicatures cannot be frequently relied upon in determining the communicative content of legislative speech. In other legal contexts, however, the conclusion might be different. There are two main examples that I have in mind here. First, even in the legislative domain, implicatures might have a greater role to play in the realm of administrative regulation. Regulatory legislation is often done by expert agencies. Administrative agencies tend to have a clearly stated general policy that they try to implement by their regulatory regime. This would often make both the contextual background and the cooperative nature of legal speech, so to speak, clear enough to enable implicatures to play some role in determining the content of the relevant regulation.

Consider the following example: Suppose that a municipal regulation requires cafes and restaurants to have “clean and well kept indoor restrooms”. Given the context of such a requirement, surely it would be implicated by this regulation that the restrooms must be actually *open* for the patrons to use. A restaurant that had impeccable restrooms that are kept locked at all times, would have failed to abide by the regulation, even if it is true that the restaurant does have “clean and well kept indoor restrooms”. I assume that there might be many such cases. They would be confined, however, to those legal domains in which regulation has a very clear and widely recognized purpose that is not particularly controversial under the circumstances. In short, the closer the circumstances are to the Gricean paradigm of cooperative interaction, the more it would be likely that implicatures can play the role that they do in ordinary conversations.

More controversially, perhaps, it is arguable that implicatures would have an important role to play in determining the content of contractual obligations. Unlike legislation, one might argue, a contract is meant to be a cooperative venture. Parties to contractual relations typically aim to benefit from a cooperative exchange of promissory undertakings amongst them. This would seem to make it more plausible to assume that parties to a contract should be taken to be committed to content that is implicated by their explicit promises. Furthermore, many contracts are reached in specific commercial contexts in which there is often a rich contextual background that parties to such commercial transactions share. In such cases, it might be clear to the parties concerned, as a matter of commercial custom, that in saying P one would normally implicate Q, and in such cases it would make sense to regard the implication (unless explicitly cancelled) as part of what the relevant contractual party is committed to by saying P. In any case, it is not my pur-

pose here to argue that this is the case; how favorably one takes the possible role of implicatures in the realm of contracts would depend on one's preferred theory of contract law, and those are very controversial. I certainly do not purport to offer one here. I just wanted to mention the possibility that, depending on one's view about the rationale of contract law, implicatures might have a very different role in contracts than in the legislative context. In any case, however, note that the role implicatures might play in various legal contexts depends on normative considerations; it depends on one's views about the normative rationale of the relevant legal domain.³⁰

Finally, let me say a few words about the role of *generalized* conversational implicatures. Remember that generalized implicatures are generated by a combination of some semantic features of the expression used, and pragmatic determinants that are specific to the conversational situation. More precisely, there are some expressions in language that in uttering them one would normally create an implicature, unless specifically cancelled by the speaker or by some other contextual feature of the speech situation. I doubt it that there are many examples of this, but there are some. Perhaps the most familiar example in the legal context is the use of statutory exceptions. Suppose the law says "all Xs ought to ϕ , unless X is an F, a G, or an H". The meaning of 'unless' would normally implicate that the exceptions are exclusive. (Namely, that *all* Xs who are not (F or G or H) ought to ϕ .) Note that such implication is always cancelable. The legislature can easily indicate that it did not consider the listed exceptions to be exclusive. Now, it might be reasonable to conclude that absent any such indication, the use of 'unless' implicates

³⁰ A favorable view about the role of implicatures in contract law would naturally follow, for example, from the kind of theory that regards contract as a form of, or at least on par with, moral promises, such as defended by e.g. Seana Shiffrin, 'The Divergence of Contract and Promise' *120 Harvard Law Review* 708 (2007).

that no other exceptions would be permitted. But the truth is that even this modest conclusion does not necessarily fit legal reality. At least in the common law tradition, judges have figured out ways to avoid such conclusions by various doctrines of statutory interpretation. The judicial decision in *Holy Trinity* is a case in point. To be sure, the fact that judges tend to ignore these kind of implicatures does not mean that the implicature is not there; judges tend to ignore them because they are skeptical, and perhaps rightly so, of a legislature's ability to determine in advance all the possible justified exceptions to the general norm enacted. But again, this testifies to the fact that the discourse between the legislature and the courts is not necessarily a cooperative business, and that the division of labor between legislatures and courts is a morally-politically contentious issue.

B. Semantically Encoded Implications.

Grice mentioned the possibility that some implicatures are conventional, that is, they follow from the meaning of the words used.³¹ Elsewhere I have argued at some length why I do not think that conventions are necessarily involved here (and that's why I will not refer to these cases as 'conventional implicatures')³², but this is a side issue; the essential point remains, namely, that there are many expressions in a natural language that carry a certain implication as a matter of their semantic meaning.³³ These are cases in which the speaker is committed to a certain content simply by virtue of the words she has uttered (in a given sentence), regardless of the specific context of conversation. Consider the following examples:

³¹ Grice, *Studies in the Ways of Word*, at pp. 24-26.

³² *Social Conventions: A Philosophical Analysis*, book ms, chapter 5.

³³ See, for example: L. Karttunen & S. Peters, 'Conventional Implicature', *Syntax and Semantics*, vol. 11, 1979.

- (1.) ‘X is A *but* B’ – implicating that the conjunction of X being both A and B is somehow surprising or particularly interesting etc.
- (2.) ‘*Even* X can A’ – implicating that (i) there are others, besides X, that can A, and that (ii) amongst the relevant agents, X is among the least likely to A.
- (3.) ‘X *quit* A-ing’ – implicating that X had done A in the past with some regularity.
- (4) ‘X *moved* from New York to Los Angeles last spring’ – implicating that X had lived in New York for some time.
- (5) ‘X *managed* to find A’ – implicating that finding A involved (or, was expected to involve) some effort or difficulty.

All these cases exemplify one and the same phenomenon, namely, that a certain content is implicated as an integral part of the *literal meaning* of the words used (in the sentence uttered). Furthermore, note that none of the two conditions Grice attaches to conversational implicatures apply here: the implications in (1) - (5) are not cancelable by the speaker and there is no need for any derivation, for any story to be told about the specific context of the conversation, as it were, about how we got here. The implied content simply forms part of what the relevant words literally mean; it is *semantically encoded* in the literal meaning of the relevant expression.³⁴

As a word of caution, however, note that the semantically encoded implication does not necessarily follow from the meaning of individual words; in some cases, different content is implicated by the same word used in different types of sentences. As an example compare these two sentences:

³⁴ Note that the relevant implication remains even if the expression is embedded; for example, the statements -- “it is not true that x quit A-ing”, or “X did not quit A-ing”; or in conditional ‘if X quit A-ing, he would be better off’, -- carries the same implication as “X quit A-ing’, namely, that X has done A in the past with some regularity.

(6). “Joseph was in the room, *too*.”

(7). “If Joseph goes to the meeting, the department chair will be there *too*”.

In both cases, there is some content that is clearly implicated by the use of the word “too”, but the content in (6) is different from that in (7): the implication of the use of “too” in (6) is that there are others, beside Joseph, who were in the room; the use of “too” in (7) implicates that Joseph is not the department chair.³⁵ Admittedly, however, this is a problematic example; some might be inclined to account for the difference of implication in pragmatic, rather than semantic terms. I do not want to make too much of this here, only to point out the possibility that the same word might implicate different type of content, depending on the type of sentence uttered.

Note, however, that in all these cases, the implied content, though semantically encoded, does not form part of what has been explicitly asserted. It is a commitment, and one that necessarily follows from the words used, but not explicitly part of what has been asserted. The relevant content here is only implicated, and not quite asserted, mostly because the implied content is unspecified. Suppose S says ‘X is a politician but he is quite honest’. The use of ‘but’ clearly implies that S believes/assumes that politicians are not generally very honest people, or that it is somehow surprising – or perhaps just would be surprising to his hearers -- that a politician is honest, or something along those lines. However, S did not quite assert this. Nevertheless, some such content is clearly implicated: when we are confronted with an explicit denial of the implied content, we would feel a certain unease. Suppose we confront S with a request for clarification: ‘Are you saying that politicians are not usually honest people?’, and then, in response, S says: ‘Oh,

³⁵ This example – though not quite the point of it -- is taken from an unpublished transcript of a lecture by Saul Kripke, “Presupposition and Anaphora: Remarks on the Formulation of the Projection Problem”.

no, I did not say this'. Well, true enough, S did not say this, but we would also feel that there is something disingenuous in S's denial; it just doesn't feel right.

In the previous section I argued that the role of implicatures in legal contexts is, at best, very unclear. Now I would like to argue that the opposite conclusion follows about implied content that is semantically encoded in the relevant legal expression. But before I try to make this argument, an important clarification is called for. It is certainly not part of my argument that a speaker is committed to all the content that is logically or otherwise *entailed* by what he said. It makes no sense to maintain that we are generally committed to have implied, in any sense whatsoever, everything that is entailed by what we say on this or that occasion. Surely, all those who have used and expressed the axioms of arithmetic for centuries cannot be taken to have been committed, in any sense whatsoever, to the truth of Gödel's theorems, though as we now know, Gödel's theorems are entailed by those axioms.³⁶

Speakers are normally committed to content that is *obviously and transparently* implicated by the semantic features of the expression they have uttered. A certain content *q*, would be obviously and transparently implicated by saying "p" in context C, iff the semantic-meaning of "p" would normally imply that *q*, and an attempt to deny the implication would strike any reasonable hearer (in context C) as perplexing, disingenuous, or dishonest. If this is correct, then it would seem to follow quite straightforwardly that semantically encoded implications would normally form part of the content of the law. If there is any doubt about this, it would probably relate to the relative uncertainty of the implied content. As we noted above, the content that is implied by the kind of expres-

³⁶ To be more precise, Gödel's theorems are not entailed only by the axioms, but also by set theory and some other truths about arithmetic. I owe this example to Scott Soames.

sions under consideration here is somewhat unspecified. The specification of such content is typically context dependent. Nevertheless, the semantically encoded information we gain by the use of such expressions is fairly specific, and even if it leaves some content unspecified, the information encoded might be sufficient to make a difference. If a speaker asserts, for example, that “Even John can pass the test”, the speaker is clearly committed to the following content: (i) that there are others, beside John, in some relevant reference group, who can pass the test; and (ii) that amongst those in this group, John is one of the least likely to be able to pass the test. Of course we need some contextual background to know what is the relevant reference group here. In this respect, the content is semantically underspecified. But the rest of the content in (i) & (ii) is semantically entailed by the use of the word “even” in this sentence, regardless of the particular context of this utterance. And this content is not cancelable: imagine a speaker who says: “Even John can pass the test, after all, he was the best student” – this would be a very perplexing utterance; it is difficult to imagine a context in which it would make sense.

Generally speaking, it would be difficult to think of a legal context where semantically encoded implication, if there is one, should not be seen to form part of what the law determines. To the extent that the content of the law is determined by what the law says, this content must include semantically encoded implications. Admittedly, however, the distinction between implications that follow only from the semantics of the expression used, and those in which some pragmatic elements also play a role, is not always so easy to draw. Consider, for example, a speaker S, uttering the following sentence:

(8). “All Xs who are F ought to ϕ ”.

There is a clear sense that in uttering (8), the speaker, S, is committed to the content that *there might be an X that is not F*. Is this an implication that is semantically encoded in (8)? Not entirely. What (8) basically implies is something like this: *For all that S knows*, (in the context of this utterance) there might be an X that is not F. Why is that? Arguably, because otherwise S would have violated the maxim of quantity (“don’t say too little”). Had S known that all Xs are Fs, his utterance would have expressed too weak a proposition, it would have said too little, as it were. Therefore, we may safely conclude from the utterance of (8) that for all the speaker knows, there might be an X that is not F. But this implication partly depends on the Gricean maxim of quantity, it is generated by some pragmatic features of the speech. What we have here, I think, is some information that is encoded in the expression used, that together with the assumption that the speaker adheres to the maxim of quantity, generates a certain implicature. It is, basically a case of a generalized conversational implicature.

C. Pragmatic Presuppositions.

In addition to content that is conversationally implicated by an utterance in a given context, and content that is implicated by the meaning of the words uttered, there are many cases in which a given utterance would only make sense if there is a certain content that is presupposed by the speaker in relation to the background knowledge shared by his hearers. In other words, presupposition consists in content that is not actually asserted, but would need to be taken for granted in order to make sense of the asserted content. This is the type of content that is either already shared by the conversational participants, or else, the hearers would be willing to accommodate for the purpose

of the conversation. The interesting cases, however, are those in which we can infer the presupposition from the utterance itself. Soames defines *utterance presuppositions* as follows:

“An utterance U presupposes P iff one can reasonably infer from U that the speaker S accepts P and regards it as uncontroversial, either because
(a) S thinks that P is already part of the conversational background at the time of U; or because
(b) S thinks that the conversational participants are prepared to add P, without objection, to the background.”³⁷

Note, however, that this definition covers both those cases in which the presupposed content is semantically encoded in the expression uttered, and utterances in which this is not the case.

Consider the following examples:

(1). “It was Jane who broke the vase.”

Presupposition: somebody broke the vase.

(2). “Bill regrets lying to his parents”

Presupposition: Bill [believes that he] lied to his parents.³⁸

(3) “John’s wife is going to the concert tomorrow”

Presupposition: John is married.

(4) “The Republicans and senator Joe voted for the bill”

Presupposition: Senator Joe is not a Republican.

(5) “Joseph is not coming tonight”

Presupposition: Joseph was expected to come tonight.

³⁷ S Soames, “Presupposition”, D Gabbay & F Guenther (eds), *Handbook of Philosophy of Logic*, Volume IV, (1989), 553, at 573.

³⁸ I take it that it is possible for an agent to regret that P, even if P has not actually occurred; it is impossible for an agent to regret that P, however, if the agent does not *believe* that P occurred.

There seems to be an important difference between (1) – (3), and (4) & (5) which is easily seen by juxtaposing each utterance with the negation of the presupposition:

(1a): “It was Jane who broke the vase” & Nobody broke the vase.

(2a): “Bill regrets lying to his parents” & Bill does not believe that he lied to his parents.

(3a): “John’s wife is going to the concert tomorrow” & John is not married.

(4a): “The Republicans and senator Joe voted for the bill” & Senator Joe is a Republican.

(5a): “Joseph is not coming tonight” & Joseph was not expected to come tonight.

What is common to all these cases is that if the presupposition is negated, as in (1a) – (5a), there is a clear sense in which the utterance would not make much sense. However, in the first three cases, the utterance would not make sense because the negation of its presupposition would involve a certain contradiction with the asserted content of the utterance.³⁹ It just cannot be the case that it was Jane who broke the vase when nobody broke it; or that John’s wife is going to NYC when John does not have a wife, etc.⁴⁰ However, note that no such contradiction is involved in the examples of (4a) and (5a). To assert (4) in conjunction with the negation of its presupposition would be rather awkward, but not contradictory. And the same goes for (5a). What creates the awkwardness here is the fact that given the falsehood of the presupposition, it would be difficult to understand *why* the speaker uttered the sentence that he did, as it would make no relevant contribution to the conversation.

³⁹ The question of whether such contradictions necessarily undermine the speaker’s ability to express something that is at least partly true, will be taken up below.

⁴⁰ I don’t know what would be the best semantic theory that can take us from “John’s wife is....” to “John has a wife”, or from “A did X” to “X happened”, etc; I am just assuming that there is one.

I am not suggesting that Soames's definition of *utterance presupposition* is over-inclusive. There are many good reasons to consider these cases together.⁴¹ However, for our present purposes, it might be useful to focus on those presuppositions which are not semantically encoded in the meaning of the sentence uttered. We have already discussed the cases in which the implicated content is semantically encoded, and argued that this is the kind of implied content that would normally form part of the law. I believe that the same considerations apply to semantically encoded presuppositions. Even if these linguistic phenomena are somewhat different (and I am not entirely sure that they are), they have this essential aspect in common: the implied/presupposed content is not cancelable by the speaker. As we have seen earlier, non-cancelable content that is implied by the law would normally form part of the law.

One interesting pragmatic aspect of presuppositions, noted by Soames in the definition above, is the phenomenon of accommodation. When a speaker utters a sentence in a given conversation, the speaker would normally assume that there is some content that is already shared by his hearers and therefore does not need to be asserted. However, sometimes an utterance involves a presupposition that adds some information to the conversational background, information not previously shared by the conversational parties. In such cases, the speaker acts on the assumption that his hearers would be willing to add the presupposed content, without objection, to their shared background. Consider, for example, the utterance of (3): it is quite possible that the hearer of this utterance was not aware of the fact, or may have not known, that John is married. If the speaker is willing to utter (3) as stated, it is because he would assume that the hearer is willing to add this

⁴¹ The most important one, presumably, is the problem of projection, namely, which constructions allow utterances to inherit the presuppositions of their constituent elements.

information to her background knowledge without any particular difficulty; so *now* she knows that John is married, and she's willing to add this information to her background knowledge in this conversation.

In the legal case, however, accommodation might not work so smoothly. Let me illustrate the problem with the famous case of *TVA v Hill*.⁴² This was a very complicated litigation about the construction of the Tennessee Valley River dam. Environmental organizations wanted to halt the construction of the dam, claiming that it would endanger the habitat of a small fish, called the snail darter, in violation of the Endangered Species Act.⁴³ As it turned out, however, long after the environmental issues have come to the public's attention, Congress continued to fund the construction of the dam in a number of appropriation bills. Now, one would have thought that if Congress appropriates funds to the construction of a certain project, the presupposition is that the project is thereby legally authorized. Nevertheless, the supreme court decided that these appropriation bills cannot be taken to have indicated that Congress actually authorized the construction of the dam in face of the environmental opposition that was salient by that time. In effect, the court basically refused to accommodate the information that was conveyed by the presupposed content of the appropriation bills. And this, I think, is what makes pragmatic accommodation in law much more problematic than in ordinary conversations: since the content of the presupposition is not part of the asserted content of the law, the courts always have the option of refusing to accept the validity of such presupposed content. This is particularly easy for the courts to do when – as in the *TVA v Hill* case -- the utterance

⁴² 437 U.S. (1978) 153.

⁴³ One of the ironies of this case is that after the supreme court ruled on behalf of the environmentalists and ordered a halt to the construction of the dam, it turned out that the snail darter is not an endangered species at all, its habitat much more diverse than assumed at the litigation.

presupposition is not of the kind that is semantically implicated by the language of the legal regulation.

This leads to the final question I would like to consider here, which seems particularly relevant to many legal cases, about those instances in which the presupposed content of an utterance turns out to be false. It is, I think, an open question of whether the falsehood of the presupposition necessarily undermines the truth of the statement uttered. Sometimes, as the utterances of (1) and (2) exemplify, if the presupposition is false, then the utterance cannot be true either. However, sometimes the falsehood of the presupposition would undermine part of the asserted content, but not necessarily affect the truth of its main part. Speakers can succeed in asserting something that is mostly true, even if the relevant presupposition of the utterance is false. Consider, for example, the utterance of (3): “John’s wife is going to the concert tomorrow”, presupposing, as we’ve seen, that John is married. Suppose the truth is that the woman spoken about, let us call her Jane, is not John’s wife, since John and Jane are not married. Would this necessarily entail that the speaker failed to assert something true? Not necessarily. If both speaker and hearer share the understanding that the utterance refers to Jane, then the speaker would have succeeded in saying something that can be *mostly true*, namely, that Jane is going to the concert tomorrow.⁴⁴

Similarly, consider the following legal example – suppose that there is a rule which states:

(7) “Unless otherwise specifically authorized by X, all persons are required to refrain from ϕ -ing in circumstances C.”

⁴⁴ This is a well known type of case, usually discussed in the context of definite descriptions and direct reference. See, for example, Soames, S., ‘Direct Reference, Propositional Attitudes, and Semantic Content’, *Phil Topics*, vol 15, (1987) 47.

Now assume that the legal authority referred to as “X” has long been abolished and presently there is no such legal entity (or perhaps it never existed). In other words, rule (7) presupposes the existence of a certain legal entity that does not exist. Hence the presupposition is, in a clear sense, false. Would this undermine the main content of (7)? Would we have to say that people are not required by law to refrain from ϕ -ing under circumstances C? I don’t think that this would necessarily follow.

As far as I can tell, most of the cases in which the truth of presuppositions might affect a legal result arise in the context of contracts. It is not infrequent in contractual relations that promises are exchanged and commitments undertaken on the background of certain presuppositions. And then, when performance is due, it may turn out that the presupposition had been false. Typically, this makes the performance of the contractual obligation much more expensive for one of the parties than had been anticipated during the formation of the contract. Complex legal doctrines have evolved to deal with such cases and I will not try to summarize them here. I think that lawyers are right to assume, however, that linguistic considerations are not going to solve these legal issues. From a linguistic perspective, lawyers would be right to assume that the falsehood of the presupposition does not necessarily undermine the legal commitment. Whether it should, remains a legal-normative issue that probably needs to be resolved on the merits of each type of case.

Let me explain why I believe that this is the case. In normal circumstances, when the speaker utters an expression that amounts to a promise, the assertion is rendered true by its utterance alone. If I say: “I promise to come to your party tonight” or, which basically amounts to the same, “I will come to your party tonight”, I have expressed a com-

mitment. The assertive content of this expression is the undertaking of a commitment, and as such, it is true by virtue of its utterance alone. It is true that I have undertaken the relevant commitment by saying that I did, because saying so (under normal circumstances) is what makes it so.⁴⁵ The truth of the assertion, however, does not by itself settle any moral or legal issues; it does not necessarily settle the question of whether I *ought* to keep my promise, nor, in fact, whether I *intend* to do so. Both are separate issues, which have no bearing on the truth of the asserted content. Therefore, the fact that the assertive content of a promise might remain basically true even if its relevant presupposition, assuming there was one, is false, would not really settle any of the questions that are legally relevant, namely, whether in those circumstances the speaker ought to keep her promise. There might be one exception to this: when the presupposed content of a promise is so blatantly false as to immediately render the promise absurd – e.g. “I promise you that I will fly to Mars” -- then, it would probably be the case that the falsehood of the relevant presupposition (in this example, that I can fly to Mars) would undermine the truth of the statement of the promise. More accurately, however, I think it is better to say that in such cases, the speaker fails, pragmatically speaking, that is, to express a commitment. It is just one of those cases where the speaker cannot be taken to have asserted what he said. Barring such unusual circumstances, however, it is generally the case that the falsehood of the relevant presupposition does not undermine the truth of the content asserted by expressing a promise. But again, this does not settle any of the relevant normative issues concerning the question of whether the promisor ought to keep her promise or not.

⁴⁵ See, for example, Lemmon, ‘On Sentences Verifiable by Their Use’, 22 *Analysis*, (1962), 86, and Bach K. and Harnish R. ‘How Performatives Really Work’, 15 *Linguistics and Philosophy*, (1992),93. I defend this view in greater detail in my book *ms on Social Conventions*, ch 5.

Conclusion

Let me briefly summarize the conclusions that I sought to establish here. There are two main types of cases in which the legal context pragmatically differs from ordinary conversation. First, in ordinary conversational contexts, it is often evident that the content asserted differs from what has been said. In the legal context, I argued, the contextual background is typically not rich enough to enable this phenomenon to play the role that it normally does in our everyday conversations. A similar conclusion follows about the limited role that conversational implicatures may play in the law, but for different reasons. Conversational implicatures tend to be unreliable in the legal context, because there are no clear and uncontroversial norms that determine what counts as relevant contribution to the communicative situation. We have also seen that the legal context is not uniform in this respect, and that in some legal contexts, implicatures may have a greater role to play than in others.

Finally, I argued that the distinction between asserted and implied content is not always determined by contextual factors. There are cases in which a certain content is implicated in virtue of the semantic features of the expression used. Semantically encoded implications and/or presuppositions are relevant in the legal context just as they are in ordinary conversation. Communicative commitments that derive from the meaning of the expression used are normally part of what the law prescribes, even if the implicated content is not entirely specified by the meaning of the legal utterance.⁴⁶

⁴⁶ I am truly indebted to Scott Soames for his detailed comments on an earlier draft of this essay. This paper grew out of a seminar we have co-taught in the fall of 2006, and I am very grateful to Scott for everything that I've learned from him, and his influential writings, about these issues.